Supreme Court, U.S.
FILED
AUG 16 1996
CLERK

(2)

No. 96-81

IN THE
Supreme Court of the United States

October Term, 1995

RONALD L. RENNICK AND RICHARD S. RENNICK, *pro se,*

Petitioners,

vs.

OPTION CARE, INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BARRY M. HELLER
Counsel of Record for Respondent
CHRISTINE E. LANZON
G. SHARON STONE
RUDNICK, WOLFE, EPSTIEN & ZEIDMAN
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 712-7200

31 pp

LIST OF INTERESTED PARTIES

The petition lists only those entities which were parties below, but which did not join in the petition.

The Petitioners are Ronald L. Rennick and Richard S. Rennick (the "Rennicks"). Although they are proceeding *pro se* here, the Petitioners were represented by counsel in all proceedings below.

The Respondent is Option Care, Inc., a California corporation ("Option Care"). The Respondent is a wholly owned subsidiary of Option Care, Inc., a Delaware corporation. The Respondent has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

List of Interested Parties i

Table of Contents ii

Table of Authorities iv

Opinions and Orders Below 1

Statement of Jurisdiction 1

Statutory Provisions 2

Statement of the Case 2

Reasons for Denying the Writ 8

I. The petition is untimely, as it was filed more than 90 days after denial of the Rennicks' petition for rehearing below 8

II. There is no "confusion" among the lower courts regarding the standards to be applied in resolving summary judgment motions 9

A. The lower courts do not conflict in applying the summary judgment principles enunciated in *Anderson, Celotex*, and *Matsushita* 10

B. The lower court cases do not conflict with the summary judgment decisions of this Court 13

C. An allegation that some lower courts did not articulate the summary judgment applied in particular cases does not evidence a conflict justifying this Court's review 14

III. The Rennicks' Seventh Amendment right to a jury trial was not abridged by the court of appeals decision to affirm the grant of summary judgment 17

A. The court of appeals applied the correct standard and reached the correct result . . . 18

B. Seventh Amendment concerns do not justify this Court in granting certiorari even if summary judgment were improperly granted in this case 23

Conclusion 24

APPENDIX

Appendix A -- Order of the United States Court of Appeals for the Ninth Circuit Entered April 12, 1996 . . . . . 1a

Appendix B -- U.S.C. § 2101(c) 3a

TABLE OF AUTHORITIES

Cases Cited:

Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994) 12

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 13

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10, 11, 13, 14, 15, 19, 23

Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335 (3d Cir. 1987) 12

Ashe v. Corley, 992 F.2d 540 (5th Cir. 1993) 11, 12

Beck v. American Health Group International, 260 Cal. Rptr. 237 (Ct. App. 1989) 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 10, 13

Clark v. Coats and Clark, Inc., 929 F.2d 604 (11th Cir. 1991) 11, 12

Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971) 9

Table of Authorities Continued

Dick v. New York Life Insurance Co., 359 U.S. 437 (1959) 23

Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902) 17

Galloway v. United States, 319 U.S. 372 (1943) 18

Gray v. York Newspapers, Inc., 957 F.2d 1070 (3d Cir. 1992) 12

In re Peterson, 253 U.S. 300 (1920) 18

Kruse v. Bank of America, 248 Cal. Rptr. 217 (Ct. App. 1988), *cert. denied*, 488 U.S 1043 (1989) 20

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 547 (1986) 10, 12, 13, 15

McLaughlin v. Liu, 849 F.2d 1205 (9th Cir. 1988) 12

Missouri v. Jenkins, 495 U.S. 33 (1990) 9

Monarco v. Lo Greco, 220 P.2d 737 (Cal. 1950) 22

Table of Authorities Continued

Phillippe v. Shapell Industries, Inc., 743 P.2d 1279 (Cal. 1987), *cert denied*, 486 U.S. 1011 (1988) 22

Rebel Oil Co., v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995) 16, 19, 22

Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987) 19

Smissaert v. Chiodo, 330 P.2d 98 (Cal. Ct. App. 1958) 20

T.W. Electric Service v. Pacific Electric Contractors, 809 F.2d 626 (9th Cir. 1987) 19

Tabas v. Tabas, 47 F.3d 1280 (3d Cir.) (*en banc*), *cert. denied*, 115 S. Ct. 2269 (1995) 14

Teague v. Regional Commissioner of Customs, 394 U.S. 977 (1969) 9

W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995) 11

Statute Cited:

28 U.S.C. § 2101(c) 1, 9

Table of Authorities Continued

United States Constitution Cited:

Seventh Amendment 17, 23

Rules Cited:

Supreme Court Rule 10 9

Supreme Court Rule 13 . . . . . 1, 9

Fed. R. Civ. P. 56 15

Other Authorities Cited:

James Joseph Duane, *The Four Greatest Myths About Summary Judgment,* 52 Wash. & Lee L. Rev. 1523 (1995) 13, 16, 19

Gregory A. Gordillo, *Summary Judgment and Problems in Applying the Celotex Trilogy Standard,* 42 Clev. St. L. Rev. 263 (1994) 16

Samuel Issacharoff and George Loewenstein, *Second Thoughts About Summary Judgment,* 100 Yale L.J. 73 (1990) 15

Table of Authorities Continued

Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process,* 49 Ohio St. L.J. 95 (1988) 16

Brian L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence,* 94 Dick. L. Rev. 25 (1989) 17

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Option Care, Inc. requests that the Court deny the petition for writ of certiorari seeking review of an opinion entered by the United States Court of Appeals for the Ninth Circuit which affirmed the grant of summary judgment in Option Care's favor. For the convenience of the Court, citations to the opinion (which is reported at 77 F.3d 309) will be to the opinion reproduced as Appendix B to the petition ("Pet. App. B at [page]").

OPINIONS AND ORDERS BELOW

In addition to the opinions cited in the petition, the Ninth Circuit entered an order, filed April 12, 1996, denying the Rennicks' petition for rehearing and suggestion for rehearing *en banc*. The April 12, 1996 order is reproduced as Appendix A. An identical copy of the April 12 order was reissued and reentered on the court of appeals' docket with the date April 15, 1996. A copy of that duplicate order is reproduced as Appendix B to the petition.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case, as the petition for writ of certiorari was untimely filed under Supreme Court Rule 13 and 28 U.S.C. § 2101(c). *See* Reasons For Denying The Writ, Part I., below.

STATUTORY PROVISIONS

The relevant portion of 28 U.S.C. § 2101(c) is reproduced as Appendix B.

STATEMENT OF THE CASE

This is a breach of contract case. The Rennicks claim that Option Care entered into an enforceable oral contract to grant to the Rennicks and others the exclusive right to establish an unlimited number of franchise units throughout Canada, plus the rights to 10 existing and 10 new franchises in the United States -- all as a result of a meeting, a handshake, and a letter of intent which was expressly non-binding. In the face of documents created both immediately before and immediately after the meeting, in which Option Care expressly disclaimed any intent to enter into a contract without further negotiation, formal documentation, and board of director approval, the court of appeals properly affirmed the grant of summary judgment in Option Care's favor.

Option Care is a nation-wide franchisor of technology and know-how relating to alternative setting infusion therapy. E1237.[1] A corporation controlled by Petitioner Ron Rennick operated two Option Care franchises in the state of Oregon, and Ron and his brother, Petitioner Rick Rennick, incorporated HHC-Home Healthcare, Inc. ("HHC") for the purpose of exploring ways to bring the Option Care system into Canada and to expand the Rennicks' Option Care franchise holdings in the United States. E1237-38. In the

---

1. References to "E[page]" are to the Joint Excerpts of Record and Supplemental Excerpts submitted to the court of appeals.

summer of 1990, Rick Rennick scheduled a meeting among HHC, Option Care, and Vantec Ventures, Inc., a venture capital company. E1238, E026-27. According to a meeting agenda prepared and circulated by Rick Rennick, the purpose of the meeting was:

- To *discuss proposed* reverse takeover of [Vantec] by HHC and *proposed* equity participation by [Option Care].
- To formulate terms of *proposed initial agreement* to this end *for Board approval of all parties*.
- To formulate *proposed general development business plan* for specific time periods.

E036 (emphasis added). Prior to the meeting, Option Care's president, Mitchell Hoggard ("Hoggard"), met with Option Care's board of directors. As the minutes of that meeting reflect, Hoggard was given "authority to move forward" with the negotiations, but the board and Hoggard understood that Hoggard "must have final board approval before making any commitments." E031-33; Hoggard Dep., E338.

On July 3, 1990, HHC (represented by the Rennicks) met with representatives of Option Care (including Hoggard) and Vantec (the "July 3 meeting"). The parties discussed an arrangement whereby, among other things, HHC would be granted the right to open franchises throughout Canada, to acquire 10 existing franchises in the United States, and to open 10 new franchises in the United States without the payment of initial franchise fees. E1239. At the close of the meeting, the parties shook hands. One of Vantec's board

members who was present, Keith Alexander, testified that the handshake was initiated at his suggestion:

> At the end of the meeting I volunteered that the way we had formalized relationships before getting lawyers involved was to sort of do it on a handshake basis, and that we wanted to feel that the people we were dealing with were as good as their word. And we usually formalized that by a handshake on the deal.
>
> So I proposed that, having spent these previous months and these three or four hours bringing into the best form we could our understandings, that we formalize the deal with a handshake. And my recollection is that Mitch [Hoggard] enthusiastically agreed to that and all the principal parties got up and circulated around the room and shook hands with each other on having made the deal. And I recall Mitch [Hoggard] saying, Okay, guys, let's make this work.

Alexander Dep., E680 (Pet. App. F at 61a-62a). Also at the close of the July 3 meeting, Rick Rennick and Option Care agreed that a letter of intent would be drafted for review and signature by all the parties. E1240.

Seven days after the July 3 meeting, HHC sought an interim loan from Vantec. Vantec refused to advance any funds until the letter of intent was signed, and added that it "look[ed] forward to the early completion of negotiations" with Option Care. E050, E052. Moreover, in a submission

to the Alberta Stock Exchange, Vantec referred to its "proposed agreement" with Option Care. E053-55.

Rick Rennick produced a first draft of a letter of intent three days after the July 3 meeting. The draft provided that the final documentation to be prepared required the approval of the board of directors of all the parties. E1240, E044-48. Option Care modified the draft in order to "clarify the intent of Option Care, Inc. in signing this document." E060. As revised, the letter of intent provided:

> The purpose of this letter is to acknowledge the respective *intentions* of [the parties], expressed during a meeting held in Richmond, B.C. on July 3, 1990, and *directed toward the creation of a binding interim agreement* and other contracts designed to implement various *proposed relationships* among the parties.
>
> * * *
>
> [T]he signatories to this letter confirm their *intent to continue good faith discussions directed toward the creation of formal written contracts that, upon approval by the Board of Directors of each party,* will be executed to establish the following arrangements, and to do such other things as may be required in connection therewith.
>
> * * *

> Immediately upon receipt of your acceptance of the terms hereof, we will proceed to make arrangements with counsel for each of the parties for the completion of the Interim Agreement aforesaid and the completion of final formal documentation, *with the understanding that this letter of intent is of no binding effect on any party hereto.*

E056, 058-59 (emphasis added).

The negotiations continued, but no agreement was ever reached. Vantec announced the end of negotiations in a news release stating that "the *preliminary agreement in principle* [with Option Care] will not proceed as planned." E131 (emphasis added). Because the parties never completed an Interim Agreement or any other "final formal documentation," Option Care's board of directors was never asked to approve, and never did approve, the arrangements proposed at the July 3 meeting. E1240.

The Rennicks brought this action against Option Care, alleging breach of an oral agreement allegedly made at the July 3 meeting.[2] The complaint also alleged claims for violation of California's franchise statute, breach of an implied covenant of good faith and fair dealing, breach of fiduciary duty, and promissory estoppel. After initially denying Option Care's motion for summary judgment (Pet. App. D), the district court granted the motion on reconsideration, holding that any oral contract was barred by

---

2. Vantec, HHC, and two HHC subsidiaries were also plaintiffs and appellants below, but they have not joined in the petition.

the statute of frauds, and that there was no genuine issue of material fact as to any of the remaining claims. (Pet. App. C.) The court of appeals affirmed. (Pet. App. B.) Without reaching the statute of frauds issue, the court held that no oral contract had been formed in light of Option Care's expressed intention *not* to be bound absent further negotiation, formal documentation, and board approval.

In their own statement of the case, the Rennicks falsely characterize the import of the testimony regarding whether Option Care intended to enter into a contract with the Rennicks. Most significantly, the Rennicks assert that Mr. Hoggard, Option Care's president, "admitted an intention to be bound" to a contract. The evidence cited in support of this proposition is a snippet of Mr. Hoggard's deposition testimony to the effect that he intended Option Care "to be bound by the materials of this document [*i.e.*, the letter of intent] when [he] signed it." (Pet. at 21) (*citing* Hoggard Dep. E358, Pet. App. F at 54a.)

In truth, when taken in context, Mr. Hoggard's testimony demonstrates that Option Care intended only to be bound to continue negotiations toward a final, binding agreement. Mr. Hoggard clearly explains this in testimony which the Rennicks fail to cite, but which immediately follows the excerpt which they do cite:

> Q. All right. Now, did you consider this document [the letter of intent], when you signed it to bind Option Care to its terms?

> A. I believe that this document binds Option Care *to continue forward for the development of a final agreement.*
>
> * * *
>
> I just feel it's important that you understand that I believe this bound Option Care *to move forward in developing an agreement ...*

Hoggard Dep. E359-61 (emphasis added). Moreover, Mr. Hoggard had earlier testified that it was he who insisted that the letter of intent include language that it "was not binding" and "had to be approved by the board." Hoggard Dep. E356.

Thus, the Rennicks' statement that Mr. Hoggard "confirmed under oath that [Option Care] intended to be bound" to an agreement (Pet. at 27) is a gross misstatement of the record.

REASONS FOR DENYING THE WRIT

I.

THE PETITION IS UNTIMELY, AS IT WAS FILED MORE THAN 90 DAYS AFTER DENIAL OF THE RENNICKS' PETITION FOR REHEARING BELOW.

The petition was not filed until July 15, 1996, 94 days after the court of appeals entered its order, dated April 12, 1996, denying the Rennicks' petition for rehearing and

suggestion for rehearing en banc.[3] Supreme Court Rule 13 and 28 U.S.C. § 2101(c) require that a petition to this Court be filed within 90 days from the date of entry of an order denying a petition for rehearing in the court of appeals. This time limit is mandatory and jurisdictional, relieving this Court of authority to extend the time period for filing. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Accordingly, the petition should be denied as untimely. *See Teague v. Regional Commissioner of Customs,* 394 U.S. 977 (1969) (certiorari denied where petition was filed two days after the 90-day period had run); *Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1971) (certiorari denied where petition was filed one day after the statutory period had expired).

II.

THERE IS NO "CONFUSION" AMONG THE LOWER COURTS REGARDING THE STANDARDS TO BE APPLIED IN RESOLVING SUMMARY JUDGMENT MOTIONS.

Apparently in an attempt to suggest a conflict among the courts of appeals within the meaning of Supreme Court Rule 10, the Rennicks argue that there exists "confusion"

---

3. The court of appeals' docket has two identical entries denying the Rennick's petition for rehearing and suggestion for rehearing en banc. The first entry is dated April 12, 1996; the second is dated April 15, 1996. *Compare* App. A (April 12 order) *with* Pet. App. A (identical order stamped with April 15 date). On August 12, 1996, counsel for Option Care contacted the docketing clerk's office and was informed that the April 12, 1996 date was the operative date of denial of the petition for rehearing and that, through an apparent administrative error, a duplicate docketing entry was made on April 15, 1996.

among the lower courts, and that they have taken "divergent approaches," regarding the application of the summary judgment principles articulated in this Court's 1986 "trilogy" of cases.[4]

The alleged conflict is illusory. The two "lines" of cases identified by the Rennicks do not say the same thing, not because they disagree with each other, but because they considered different issues. The Rennicks have failed to identify *any* cases which pose a direct conflict meriting this Court's review. In truth, the Rennicks' argument is window dressing for their real complaint (which complaint does not merit this Court's review): that the court of appeals reached an erroneous result under the particular facts presented in this case.

A. The Lower Courts Do Not Conflict In Applying The Summary Judgment Principles Enunciated In *Anderson*, *Celotex*, and *Matsushita*.

The Rennicks claim to have identified two "divergent stream[s] of post-trilogy summary judgment application[s]." (Petition at 12.) The first "stream" -- attributed to the Eleventh, Fifth and Third Circuits -- allegedly is characterized by "resistance to the trilogy" in that "pre-trilogy standards remain prominent." (Petition at 10.) The hallmark of the second "stream" -- attributed to the Fifth, Sixth and Ninth Circuits -- is an alleged "focus[ ] on the plausibility aspects of

---

4. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Matsushita ... in conjunction with the principles of Justice White in *Anderson* that 'the evidence of the non-movant is to be believed and all justifiable inferences drawn in his favor...'" (Petition at 12-13.) This alleged "divergence" is illusory; the reason the cases in the two "streams" do not say the same things is because they deal with different aspects of the summary judgment standard.[5]

The cases identified as those that apply "pre-trilogy summary judgment standards" deal with the issue of the burden that the *movant* must meet under Rule 56. For example, in *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991), the issue before the court was whether "Coats & Clark [the movant below] met its initial burden on summary judgment," 929 F.2d at 609, and the court's holding was that "[t]he moving party bears the initial burden to show the district court ... that there are no genuine issues of material fact that should be decided at trial." *Id.* at 608. Similarly, the issue decided in *Ashe v. Corley*, 992 F.2d 540, 543-44 (5th Cir. 1993), was whether the *movant* had satisfied its obligation of demonstrating that there were no factual issues warranting trial.[6]

---

5. This may explain the apparent oddity of the fact that the Rennicks identify the Fifth Circuit Court of Appeals as an adherent of *both* "streams" of cases, and cite cases from the Third Circuit Court of Appeals in support of both "streams."

6. The case cited by the Rennicks from the Third Circuit, *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995), does not discuss the movant's initial burden on summary judgment. However, because *Matula* cites *Celotex* with approval, and cites no pre-trilogy summary judgment cases, *id.* at 493, it cannot fairly be characterized as representing a stream of

The cases identified by the Rennicks as representing a "divergent stream" of summary judgment principles do not conflict with the holdings of *Clark* or *Ashe* regarding the movant's burden of production.[7] In fact, the "divergent stream" cases do not even address that issue. Rather, they hold that the "implausibility" standard enunciated in *Matsushita* applies "only where the non-movant relied on inferences from circumstantial evidence," as opposed to direct evidence. *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988). *See Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994) ("the trial court may only inquire into the plausibility of circumstantial evidence," but must accept direct evidence as true); *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987) (distinguishing *Matsushita* because the plaintiffs had "produced direct evidence of a conspiracy"). Again, the Rennicks cite no cases in conflict with this principle.[8]

---

cases "where pre-trilogy standards remain prominent." (Petition at 10.) Perhaps the Rennicks included *Matula* as an example of the first "stream" of cases because the court, by reversing summary judgment in part, can be said to have exhibited a "reluctant approach to granting summary judgment." (Petition at 12.) However, that proposition is rebutted by another Third Circuit opinion cited by the Rennicks (*id.*), *Gray v. York Newspapers, Inc.* 957 F.2d 1070 (3d Cir. 1992). There, the court, quoting from *Anderson*, *id.* at 1078, affirmed entry of summary judgment for the defendants.

7. In fact, the Rennicks do not cite *any* case that conflicts with *Clark* or *Ashe* with respect to the movant's burden on summary judgment.

8. Indeed, one of the commentators on which the Rennicks rely, although critical of the principle espoused in *McLaughlin* and *Adams*, states that that principle has been "accepted by every court of appeals to

Thus, the Rennicks have failed to demonstrate that there is "confusion" among the circuits -- much less a direct conflict -- warranting this Court's review.

B. The Lower Court Cases Do Not Conflict With The Summary Judgment Decisions Of This Court.

The Rennicks' assertion that lower court decisions involving summary judgment issues are "in conflict with the decisions of this court" (Petition at 10) rests on mischaracterizations of the cases cited.

It is misleading to assert that courts in the Eleventh, Fifth, and Third Circuits are "resistan[t] to the trilogy" because they cite to and rely on *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). (Petition at 10.) In *Adickes*, the Court held that "the moving party ... ha[s] the burden of showing the absence as to any genuine issue of material fact, and for these purposes the material it lodge[s] must be viewed in the light most favorable to the opposing party." 398 U.S. at 157. This holding regarding the movant's burden and the treatment of inferences has never been overruled; indeed, *Adickes* was explicitly cited to or quoted in each of the trilogy cases. See *Matsushita*, 475 U.S. at 585, n.10; *Anderson*, 477 U.S. at 249; *Celotex*, 477 U.S. at 325. In fact, in *Celotex* (the only one of the trilogy cases to squarely address the issue), the Court explicitly approved the result reached in *Adickes* with respect to whether the movant met its initial burden of production. 477 U.S. at 325. Thus, courts which cite

---

squarely address the issue..." James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 Wash. & Lee L. Rev. 1523, 1574 (1995).

Adickes regarding the movant's burden are neither exhibiting "resistance to the trilogy," nor deciding cases "in conflict with the decisions of this Court."

Second, the Rennicks mistakenly imply (Petition at 12) that the Third Circuit applies a peculiarly "strict approach" to summary judgment because it adheres to the principle that the nonmovant's evidence "is to be believed." *See Tabas v. Tabas*, 47 F.3d 1280, 1287 (3d Cir.) (*en banc*), *cert. denied*, 115 S.Ct. 2269 (1995). Since this language is a direct quote from *Anderson*, 477 U.S. at 255, a case in which summary judgment was upheld, it is illogical to argue that it signals a particularly "reluctant" approach to granting summary judgment. In any event, the Rennicks acknowledge that this language from *Anderson* "has been cited more than 100 times by United States Courts of Appeal [sic], including virtually every circuit in 1995..." (Petition at 20, n.29.) That the Third Circuit has also cited this language therefore does not signal a peculiar approach to summary judgment jurisprudence.

C. An Allegation That Some Lower Courts Did Not Articulate The Summary Judgment Standards They Applied In Particular Cases Does Not Evidence A Conflict Justifying This Court's Review.

The Rennicks state the premise that courts "are often silent as to the standards they apply to summary judgments," and conclude that this "shows confusion and fosters uneven application" of the law. (Petition at 16.) The only support offered for the premise is that, in the first three months of 1988, 60% of district courts granting summary judgment did not discuss "the sufficiency of the non-movant defendant's

proffer." (*Id.*) The Rennicks miscite their source; in fact, the statistic relates to the number of courts that discussed "the sufficiency of the *defendant/movant's* production." (Emphasis added.)[9] Accurately stated, the premise is unremarkable, since in many cases the question of whether the moving party met its initial burden is not challenged and therefore is not an issue. *See, e.g., Matsushita*, 475 U.S. at 585, n.10 (issue of whether the movants carried their initial burden was not before the Court); *Anderson*, 477 U.S. at 250, n.4 (the petitioners did not raise, and the Court did not address, the question of the movant's initial burden of production).

Moreover, the conclusion drawn by the Rennicks (Petition at 16-17) that the "silence" of courts on this issue may cloak ulterior motives -- such as the courts' desire to clear their dockets, to disguise their uncertainty as to how to apply Rule 56, or to provide cover for their inclination to make "quasi-political decisions as to the types of cases which they want to go to trial" -- is unsupported either by evidence or common sense. More likely, courts do not engage in extended discussions of legal principles in instances where they are either well-established or not germane to the issues presented for decision or review. In any event, since courts are not required to state findings of fact or conclusions of law when deciding summary judgment motions -- indeed, are not required to issue any opinion at all -- the evil motives and effects attributed to the lower courts by the Rennicks are unwarranted.

---

9. Samuel Issacharoff and George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 92 (1990).

In this case, for example, the Rennicks fault the court of appeals for failing to give any "indication of the approach it took" (although the Rennicks suspect the court may have applied "a much more stringent approach" than it ought). (Petition at 15.) But the Ninth Circuit -- and specifically the judges of the panel that decided this case -- know and have applied the principles applicable to resolving summary judgment motions (including those principles which the Rennicks claim should have led to a different result in this case). *See, e.g., Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435-36 (9th Cir.) (panel including Judges Poole and Kleinfeld reversed in part summary judgment for the defendant, finding that a genuine issue of material fact existed as to certain matters, and stating that "the court may not weigh evidence or judge witness credibility"), *cert. denied,* 116 S.Ct. 515 (1995).[10]

---

10. The law review articles cited by the Rennicks provide insufficient support for the theory that the lower courts are unable or unwilling to appiy correctly the principles of the trilogy. The articles themselves take widely divergent views on the advisability of the summary judgment procedure in general, and on the meaning and effect of the trilogy in particular. For example, the articles take conflicting positions with respect to whether the trilogy represented a radical shift harmful to plaintiffs' rights. *Compare, e.g.*, Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process,* 49 Ohio St. L.J. 95, 159 (1988) (the "holding, dicta, and implicit thrust [of *Liberty Lobby*] have already shifted the balance of power in summary judgment adjudication") *with* Gregory A. Gordillo, *Summary Judgment and Problems in Applying the Celotex Trilogy Standard,* 42 Clev. St. L. Rev. 263, 278 (1988) (empirical review of summary judgment decisions shows that plaintiffs have not "suffered" since the trilogy was decided). Some of the authorities cited by the Rennicks have been criticized by other authorities cited by the Rennicks. *See, e.g.*, Duane, *supra,* at 1570,

In sum, the summary judgment principles and procedures applied by the lower courts presents neither confusion, conflict, nor a conspiracy of silence warranting review by this Court.

III.

THE RENNICKS' SEVENTH AMENDMENT RIGHT TO A JURY TRIAL WAS NOT ABRIDGED BY THE COURT OF APPEALS DECISION TO AFFIRM THE GRANT OF SUMMARY JUDGMENT.

The Rennicks' right to a jury trial under the Seventh Amendment was not abridged by the decision below, *first*, because the court of appeals decision was correct; and *second*, because this Court's extraordinary power should not in any event be invoked in every instance where a grant of summary judgment is perceived as erroneous.[11]

---

n.175. Many of the commentators cited object to summary judgment on abstract political or philosophical grounds. *See* Stempel, *supra*, at 165 (the trilogy "entails the potential for a substantial shift and a major redistribution of political and judicial power between the bench and the laity," depriving the jury of the opportunity to "exercis[e] its powers of flexibility, equity, and nullification in favor of plaintiffs."); Brian L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence*, 94 Dick. L. Rev. 25, 56 (1989) (advocating that the "slippery" summary judgment standard of the trilogy be exchanged for a standard that seeks "internal coherence based on the relationship among beliefs within a closed system of inferences.").

11. This Court long ago rejected the argument that summary judgment and similar procedures inherently violate a plaintiff's right to a jury trial. *See Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902) (upholding constitutionality of state summary judgment

A. The Court Of Appeals Applied The Correct Standard And Reached The Correct Result.

The court below properly reviewed the record *de novo* and concluded that, as a matter of law, no enforceable contract had been formed among the parties. (Pet. App. B at 10a.) The court applied the principles urged by the Rennicks; that is, it acknowledged that it was required to "assume ... that the facts were as contrary to the movant's position as the cognizable evidence would establish if believed," (Pet. App. B at 7a), and accordingly assumed the truth of the testimony proffered by the Rennicks' witnesses. *See, e.g.*, Pet. App. B at 7a ("Thus we assume that the parties shook hands 'before getting lawyers involved' in order to give some formality to their understandings."); *id.* at 12a ("We assume that the handshakes really took place as one witness claimed.").

However, to assume that the Rennicks' version of the July 3 meeting is true does not compel the ultimate conclusion urged by the Rennicks -- *i.e.*, that an enforceable and binding agreement was reached at the July 3 meeting. In order to determine whether there was a triable issue of fact with respect to that ultimate issue, the court was required to consider two other well-established principles of summary judgment jurisprudence.

The first principle holds that, at least with respect to circumstantial or ambiguous facts, a court need accept

---

procedure); *In re Peterson*, 253 U.S. 300, 310 (1920) ("no one is entitled in a civil case to a trial by jury, unless and except so far as there are issues of fact to be determined."); *Galloway v. United States*, 319 U.S. 372, 388-93 (1943) (grant of directed verdict is constitutional).

inferences urged by the nonmoving party "only if [the inference] is 'rational' or 'reasonable' and otherwise permissible under the governing substantive law." *T.W. Electric Service v. Pacific Electric Contractors,* 809 F.2d 626, 631 (9th Cir. 1987); *see Richards v. Neilsen Freight Lines,* 810 F.2d 898, 902 (9th Cir. 1987) ("the only inferences permitted from the summary judgment record itself are those that are reasonable given the substantive law which is the foundation for the claim or defense.").

The second principle provides that, once the material facts and reasonable inferences have been identified, the court must determine "whether ... there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. Summary judgment is appropriate if the nonmovant's evidence is "merely colorable," or is "not significantly probative." *Id.* at 249-50.[12] Once again, it is the governing substantive law which provides the context for determining whether a jury trial is necessary. *Rebel Oil Co.,* 51 F.3d at 1435 (court is required

---

12. This is not to say that the court should compare the weight of the nonmovant's evidence against the weight of the movant's evidence to determine which is more credible or significant (such as a fact-finder does in determining an issue by a preponderance of the evidence). *See Anderson,* 477 U.S. at 255 (court may not make credibility determinings or weigh the evidence in ruling on a summary judgment motion). However, *Anderson* teaches that a court should and must "weigh" the nonmovant's evidence in the sense that it must assess whether the quality and quantity of proof offered is sufficient for a rational jury to find in its favor. *See* Duane, *supra* at 1556-62.

to assess whether the jury "could reasonably render a verdict in favor of the nonmoving party in light of the substantive law.").

These well-accepted principles were properly applied by the court below. First, the court identified the appropriate substantive law governing contract formation (in this case, California law, *see* Pet. App. B at 11a). Under California law, "there is no contract where the objective manifestations of intent demonstrate that the parties chose not to bind themselves until a subsequent agreement is made." (Pet. App. B at 18a) (*citing Beck v. American Health Group International, Inc.*, 260 Cal. Rptr. 237, 241 (Ct. App. 1989)). Furthermore, "[i]f there 'is a manifest intention that the formal agreements is not to be complete until reduced to a formal writing to be executed, there is no binding contract until this is done.'" (Pet. App. B at 16a) (*quoting Smissaert v. Chiodo,* 330 P.2d 98, 100 (Cal. Ct. App. 1958)). Finally, "[p]reliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement." (Pet. App. B at 16a) (*quoting Kruse v. Bank of America,* 248 Cal. Rptr. 217, 229 (Ct. App. 1988), *cert. denied*, 488 U.S. 1043 (1989)).[13]

When understood in the context of this substantive law, it is clear that summary judgment for Option Care was the correct result. On the one hand, the court assumed that the "handshake evidence" occurred as the Rennicks claimed, but recognized that a handshake can mean a variety of things

---

13. The Rennicks do not contend that the court applied the wrong substantive law, or wrongly applied the substantive law.

depending on the context. (Pet. App. B at 12a.) Thus, the court implicitly recognized that the "handshake evidence" was not direct evidence, but at most only *circumstantial evidence,* of an intent to be bound. On the other hand, the language of the agenda for the July 3 meeting, and the letter of intent which immediately followed that meeting, constituted *direct evidence* of Option Care's "objective manifestation" of an intent *not* to be bound by the discussions at the July 3 meeting. In light of the substantive law's direction that "there is no contract where the objective manifestations of intent demonstrate that the parties chose not to bind themselves until a subsequent agreement is made" (Pet. App. B at 18a), the court correctly concluded that Option Care did not intend to bind itself to a contract on July 3 as a matter of law.[14] Viewed one way, the court held that the inference urged by the Rennicks on the basis of the "handshake evidence" was neither reasonable nor rational in light of the substantive law, which accords decisive legal significance to objective (*i.e.,* verifiable as opposed to implied or subjective) manifestations of intent. Viewed another way, the court held that no rational jury could find for the Rennicks because, under the law of contract formation, no contract could have been formed in light of Option Care's repeated, written expressions of an intent *not* to be bound at that time.

---

14. The court held (Pet. App. B. at 13a):

> There is sometimes an implication in shaking hands that honor is pledged. *That implication cannot create a contract here,* because the parties expressly agreed that they did not yet have a contract.

The Rennicks are patently wrong when they claim that the court only reached its decision by "overlooking the plain statement by Alexander that he proposed the parties 'formalize' the deal by a handshake." The court quoted the relevant portion of Alexander's testimony in full (Pet. App. B at 6a-7a), and twice affirmed that it assumed this version to be true for purposes of the motion. (Pet. App. B at 7a, 12a.)

The Rennicks also wrongly claim that the court of appeals "disregarded or treated as immaterial" their proffered testimony regarding their reliance on the alleged "agreement." (Petition at 22.) Again, the court considered the Rennicks' claim, but found that it could not prevail in light of the substantive law, which provides that recovery can be had for part performance (or promissory estoppel) only where the acts taken by the plaintiff are "performed in *reasonable reliance* on the contract." (Pet. App. B at 19a) (*citing Monarco v. Lo Greco,* 220 P.2d 737 (Cal. 1950)). In addition, "[i]f a party refuses to be bound yet the other changes its position in reliance on the expectation that a contract will be made, reliance on the expectations cannot turn the non-promise into a contract." (Pet. App. B at 19a) (*citing Phillippe v. Shapell Industries, Inc.,* 743 P.2d 1279 (Cal. 1987), *cert denied,* 486 U.S. 1011 (1988). Given this substantive law, the court correctly held that, "[i]n light of the unequivocal nonbinding language in the letter of intent, reliance on the existence of a contract was unreasonable as a matter of law." (Pet. App. B at 19a.) The court did not disregard, discount, or overlook the Rennicks' evidence; it simply held that a jury "could [not] reasonably render a verdict in favor of the nonmoving party in light of the substantive law." *Rebel Oil,* 51 F.3d at 1435.

B. Seventh Amendment Concerns Do Not Justify This Court In Granting Certiorari Even If Summary Judgment Were Improperly Granted In This Case.

In *Dick v. New York Life Insurance Co.*, 359 U.S. 437 (1959), Justice Frankfurter, writing in dissent, explained why cases (like this one) which turn on the issue of whether a jury issue is presented do not warrant review by this Court:

> If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence.

359 U.S. at 455-56. Justice Frankfurter could well have added "granted summary judgment motions" to his list of decisions which do not raise Seventh Amendment issues.[15]

---

15. Since the standards for granting summary judgment are equivalent to those for granting judgment as a matter of law (formerly a directed verdict), *see Anderson*, 477 U.S. at 250, Justice Frankfurter's

Indeed, "[f]abulous inflation" and "verbal smoke screen[s]" are all the Rennicks offer in their attempt to create a constitutional argument.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

BARRY M. HELLER
Counsel of Record for Respondent
CHRISTINE E. LANZON
G. SHARON STONE
RUDNICK, WOLFE, EPSTIEN & ZEIDMAN
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 712-7200

---

admonition is equally applicable to plaintiffs whose claims are dismissed under Rule 56.

APPENDIX

APPENDIX A -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ENTERED APRIL 12, 1996

Filed
Apr 12 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-17105
D.C. NO. CV-91-01169-GEB

RONALD L. RENNICK; RICHARD S. RENNICK; VANTEC VENTURES CORPORATION; HHC-HOME HEALTH CARE, INC., HOME I.V. THERAPY OF SOUTHERN OREGON, INC; HOME INFUSION CARE OF EUGENE, INC.
d/b/a/ OPTION Care of Eugene

Plaintiffs -- Appellants

vs.

OPTION CARE, INC.,

Defendant -- Appellee

ORDER

Before: GOODWIN, POOLE and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Kleinfeld voted to reject the suggestion for rehearing en banc. Judges Goodwin and Poole so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B -- 28 U.S.C. § 2101(c)

§2101. Supreme Court; time for appeal or certiorari; docketing; stay

***

***

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.